

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2020APP00016

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE V HARRIS JA (AG)**

BETWEEN	JENNIFER CLARKE	APPLICANT
AND	ICOLYN ANDERSON	RESPONDENT

Steven Jackson for the applicant

Neco Pagon for the respondent

27, 30 July and 25 September 2020

MORRISON P

[1] I have had the opportunity to read in draft the reasons of my sister V Harris JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

BROOKS JA

[2] I, too, have read in draft the reasons of V Harris JA (Ag) and agree with her reasoning and conclusion.

V HARRIS JA (AG)

[3] This is an application that emanates from the decision of Her Honour Ms Amina Maknoon, Parish Court Judge for the Corporate Area, Civil Division ('the learned judge'), given on 16 December 2019. The respondent was successful in her action against the applicant, for breach of contract, and was awarded damages in the sum of \$131,800.00 and costs of \$1,176.00.

[4] No verbal notice of appeal was given by the applicant when the judgment was delivered, nor was a written notice of appeal lodged with the clerk of courts within 14 days of the date of the judgment as provided by section 256 of the Judicature (Parish Courts) Act ('JPCA').

[5] Being desirous of challenging the judgment of the learned judge, the applicant filed a notice of application for court orders on 23 January 2020, which was subsequently amended on 8 July 2020, requesting that she be granted an extension of time to file and serve her notice of appeal, as well as, for the judgment of the learned judge to be stayed pending the hearing of the 'application'.

[6] The application is based on the following three grounds:

- “1. That the applicant was misinformed about the process to file the appeal against the judgment of the learned Parish Judge by her attorney;
2. That the failure to file the notice of appeal at the requisite time was not intentional;
3. That she has a real prospect of success against the respondent.”

The Background

[7] A brief overview of the facts leading to the filing of the application in this court is required to put in context the reason for the decision in this matter. These facts were acquired from the affidavits of the applicant and the respondent which were filed on 8 July and 14 August 2020, respectively.

[8] According to the applicant, in June 2017, she was informed by a relative about an overseas work programme which was operated by Ms Lisa Spencer, who was the 1st defendant in the court below. Ms Spencer was not served, and therefore, was not before the court when the matter was heard by the learned judge.

[9] After paying the requisite fees, the applicant and her son enrolled in the programme. She was contacted by the respondent in or around October or November 2017. The applicant said that she informed the respondent that she was not in charge of the programme and that she herself had registered in the programme. She, however, assisted the respondent by providing her with contact information for Ms Spencer and her assistant, as well as, sending documents (including receipt of payment) to both Ms Spencer and her assistant.

[10] The programme encountered delays and problems. As a result, persons registered on the programme, including the applicant and respondent, demanded a refund of their monies from Ms Spencer. When this was not forthcoming, the respondent made a report to the Fraud Squad. The applicant was called in, questioned, and then released by the police.

[11] Sometime later, the applicant was sued by the respondent for breach of contract. The parties were sent to mediation. According to the applicant, the mediator made contact with Ms Spencer who promised to refund the respondent. The matter, not being resolved by mediation, was sent back to the court for determination. The respondent obtained a default judgment on 9 June 2019, which was subsequently set aside. The trial of the matter took place on 16 December 2019, and the respondent was awarded damages and costs in the amounts stated at paragraph [1].

[12] The applicant stated that after the judgment was handed down, she sought the assistance of an attorney-at-law to file an appeal. However, she was misinformed about the proper procedure. This misinformation caused her to initially go to the Stamp Office and the registry of this court in order to pay the requisite fees and lodge the appeal, which consumed quite a bit of her time and resources. Eventually, on 30 December 2019, she went to the court's office at Sutton Street, at approximately 2:45 pm, to lodge her notice of appeal. She was informed that the office had been closed early for the holidays, and whilst she observed persons inside the office, she was denied access to file her appeal.

[13] These were the circumstances that led to the filing of the notice of application for court orders before this court.

[14] On 27 July 2020, when the matter came on for hearing, the court directed that the amended notice of application was to be served on the respondent by email, and the respondent was given time to consider the application. On 30 July 2020, when the

proceedings came back before the court, the respondent was represented by learned counsel Mr Pagon, who requested an adjournment so that the respondent could respond to the affidavit of the applicant, and also file written submissions.

[15] The respondent was given time to file and serve an affidavit in response, along with written submissions, on or before 14 August 2020 (which was done), and the parties consented to the application being considered on paper.

[16] The respondent's evidence, as contained in her affidavit filed on 14 August 2020, is that she met the applicant in October 2017 after being referred to her in respect of a work and travel programme in the United States of America. According to the respondent, it was the applicant who told her what documents she was required to complete and directed her to pay monies into an account in the name of Ms Spencer, whom she has never met. The respondent also said that she paid \$5000.00 to the applicant as an "agent for the work and travel programme".

[17] When matters did not materialise as the respondent expected, she deposed that she demanded a refund of her monies from the applicant. When this was not forthcoming, she made a report to the police. It was after she reported the matter to the police, the respondent said, that the applicant gave her a telephone number for Ms Spencer. However, she was never able to speak with Ms Spencer on the telephone concerning her refund. Instead, all she received were WhatsApp messages, purportedly from Ms Spencer, and up to the date of trial, she has not been able to confirm if the

telephone number that the applicant had given to her belonged to Ms Spencer or if the messages she received through WhatsApp in fact came from her.

[18] In short, the respondent's position is that, the evidence that was before the learned judge was that all the transactions that she engaged in, concerning the work and travel programme, were based on instructions given to her by the applicant, who made herself out to be the authorised agent for Ms Spencer, and to whom she paid a fee in that capacity.

Discussion

The application for extension of time

[19] Section 251 of the JPCA provides that an appeal lies to this court from a judgment, decree, or order of the Parish Courts in all civil proceedings. Therefore, a judgment having been delivered in this matter, the applicant would have been entitled to lodge an appeal.

[20] It is not in issue that, in light of the provisions of section 256 of the JPCA, an appeal has not been properly lodged in this matter. The proper procedure for lodging an appeal under section 256 has been addressed in several decisions of this court.

[21] In **Ralford Gordon v Angene Russell** [2012] JMCA App 6, Phillips JA made the following observations after examining section 256 of the JPCA:

“[16] Section 256 therefore contemplates that in order for a civil appeal from the [Parish Court] to be heard, the appellant must:

(i) give notice of appeal at the time of judgment, or within 14 days of such judgment;

(ii) serve notice of appeal on the opposite party within 14 days of judgment;

(iii) deposit in the court the sum of \$600.00 [now \$5000.00] for the due prosecution of the appeal at the time of taking or lodging the appeal;

(iv) give security for costs and for the due and faithful performance of the judgment and orders of the Court of Appeal in the sum of \$6000.00 [now \$15000.00] within 14 days after taking or lodging the appeal. On the appellant complying with requirements (i) through (iii), the [parish court judge] will draw up a statement of his reasons for the judgment, decree or order appealed against, and lodge this statement with the clerk of courts who will give notice to the parties.

(v) draw up and serve grounds of appeal, on the respondent and file these grounds with the clerk of courts within 21 days of receiving notice from the clerk of the [parish court judge's] reasons. If the appellant fails to draw up, serve and file grounds, his right to appeal 'shall, subject to the provisions of section 266, cease and determine'."

[22] **Ralford Gordon v Angene Russell** was applied in the recent decision of **Mark Younis v Alvin Ranglin T/A GG Record** [2020] JMCA App 21.

[23] It is now settled that, by virtue of section 266 of the JPCA and section 12(2) of the Judicature (Appellate Jurisdiction) Act ('AJA'), this court can exercise its discretion to extend the time for the filing and serving of the notice of appeal, notwithstanding the applicant's failure to comply with some of the procedural requirements of the JPCA. This power includes the extension of time for the payment of the sum for the due prosecution of the appeal.

[24] Section 266 of the JPCA provides:

“266. The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from.”

[25] Section 266 is to be read in conjunction with section 12(2) of the JAJA which states:

“12 (1) ...

(2) Notwithstanding anything to the contrary the time within which -

(a) notice of appeal may be given, or served;

(b) security for costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;

(c) grounds of appeal may be filed or served, in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time.”

[26] To determine if the court is to exercise its discretion to extend the time for the filing and serving of the notice of the appeal, the court is to consider the length and reason for the delay, whether there is an arguable case for appeal, and the degree of prejudice that would be suffered by the other party as a result of the grant of an extension of time (see **Leymon Strachan v The Gleaner Co Ltd and Dudley**

Stokes (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999).

[27] Notwithstanding the absence of a good reason for the delay, the court may still grant an application for an extension of time, “as the overriding principle is that justice has to be done” (per Morrison JA (as he then was) in **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23 at paragraph [28] of the judgment applying **Leymon Strachan**).

[28] Each factor will now be considered in turn.

The length of delay

[29] Learned counsel Mr Jackson, on behalf of the applicant, has submitted that the delay in filing the application for an extension of time was not inordinate in the circumstances, given all the steps that the applicant took to file the notice of appeal on time. He further submitted that, in any event, delay is but one of the factors that is to be considered.

[30] Not surprisingly, learned counsel Mr Pagon, for the respondent, has not raised any challenge to this issue.

[31] The decision having been given on 16 December 2019, the applicant had until December 30, 2019 to have filed and served the respondent with the notice of appeal. The present application was initially filed on 23 January 2020, 24 days later, which, in my view, cannot be said to be inordinate.

The reason for the delay

[32] It was submitted by Mr Jackson that the applicant has provided a good reason for the delay and relies on her affidavit dated 8 July 2020. In her affidavit, the applicant deposed that she sought advice from an attorney who instructed her to file her appeal at the Court of Appeal rather than at the Parish Court. She was further told to go to the Stamp Office to pay \$5000.00 (presumably the amount for the due prosecution of the appeal as provided in section 256 of the JPCA). When she did, she was informed to go to the registry of the Court of Appeal. She was again directed to go to the Stamp Office to pay the \$5000.00, and when she returned once more to the Court of Appeal registry, it was then that she was informed that she was to go to the court's office at Sutton Street. On 30 December 2019, which would have been the last day she would have had to file and serve the notice of appeal, when she arrived at the court's office at 2:45 pm, she was told that the office had closed early for the holidays and so she was not given access to file her notice of appeal. It is important to note, at this point, that Order I Rule 1 of the Judicature (Parish Courts) Rules provides that the court's office is to be open to the public from 10:00 am to 3:00 pm each day except on public holidays.

[33] Mr Pagon has astutely, in my view, not advanced any arguments to oppose the application under this criterion.

[34] As indicated previously, section 266 of the JPCA allows this Court to admit an appellant to "impeach the judgment, order or proceedings" being appealed where any of the formalities that have been prescribed by the JPCA have been breached due to inadvertence, ignorance or necessity, and if the justice of the case so requires it.

[35] In this matter, it is clear, that the applicant took active steps to appeal the judgment of the learned judge, and her failure to comply with the requirements of section 256 of the JPCA was due to ignorance and misleading information given to her by an attorney and other persons. Further, had she not been denied access to the court's office on 30 December 2019 (which I accept was closed before 3:00 pm) she would have been in a position to file, and perhaps, serve the notice of appeal on the respondent in time.

Is there an arguable case for appeal?

[36] Mr Jackson has posited that the applicant has an arguable case for appeal on the basis that the decision of the learned judge is not supported by the evidence. The applicant, Mr Jackson argued, was not in a contractual relationship with the respondent. She was not Ms Spencer's agent, and she did not aid and abet Ms Spencer to collect money from the respondent, but rather, provided assistance to the respondent at the respondent's insistence.

[37] Mr Pagon, on the other hand, has submitted that the applicant does not have an appeal with any realistic prospect of success because the decision of the learned judge was based on findings of facts and there was ample evidence to support those findings.

[38] In the circumstances, the learned judge would have been under no legal obligation to provide a statement of her reasons for judgment. Therefore, I am not able to properly assess what would have informed her decision. Also, bearing in mind that this is not the substantive appeal, I am aware that it would not be prudent to express in

detail my views on the likely outcome of the appeal. However, it would appear, based on the affidavit evidence, that the issues as to whether the applicant and the respondent were engaged in contractual relations concerning the overseas work programme, and/or whether the applicant was an agent of the organiser of the programme, are live ones to be explored by the court. I say so, in light of the applicant's evidence that she and her son were both enrolled in the programme, she too had demanded a refund of her money from Ms Spencer and she had been questioned by the police and released without being charged. These are issues on appeal, which may well be decided either way. Therefore, it is concluded that there is an arguable case for appeal with a realistic prospect of success.

Risk of Prejudice

[39] While the respondent has not specifically alluded to any prejudice she may suffer if the application succeeds, she has given evidence of being 'put out of her money for going 3 years', and that she is not a person of significant means. She has stated that the main purpose of going on the overseas work programme was to make herself and family more financially secure. It would appear, therefore, that the respondent is indicating that the prejudice she would face, if the application were granted, is financial hardship.

[40] However, the applicant's evidence illustrates, *inter alia*, that she too has suffered a financial loss, having advanced monies to Ms Spencer, which have not been refunded. She has also deposed that the main reason for enrolling in the overseas work programme, along with her son, was to improve her financial well-being and that of her

family. It would seem to me, therefore, that the applicant would similarly face some degree of financial prejudice if she was made to pay the amount awarded under the judgment, especially if she were to succeed in the appeal.

[41] I say so on the premise that the respondent has made it quite clear in her affidavit that she is not a person of substantial means. I have, therefore, considered that should the applicant succeed in the appeal, it may be difficult for her to recover the sum paid over to the respondent.

[42] Therefore, when the respondent's position is balanced against that of the applicant, it would seem to me that the risk of prejudice would be greater to the applicant, not only on account of the risk of financial prejudice, but also on the basis that the applicant was very keen from the outset, and did as much as she could, in all the circumstances, to pursue an appeal. In my view, the applicant's failure to do so timeously, could not fairly be said to be due to any dilatory conduct on her part.

The application for a stay of execution

[43] Rule 2.15(a) of the Court of Appeal Rules (CAR) empowers the court to stay the execution of a judgment pending the outcome of a civil appeal. The applicant has requested a stay of execution pending 'application', which I believe was intended to be a stay of execution pending 'appeal'.

[44] Citing **Paulette Richards v Orville Appleby** [2016] JMCA App 20, Mr Pagon has submitted that the application for a stay must fail, there being no appeal before the

court. Learned counsel has placed much reliance on paragraphs [43] and [44] of the judgment in support of his submissions.

[45] In **Richards v Appleby**, F Williams JA, with whom the rest of the court agreed, had this to say:

“[43] The applicant’s application for a stay of execution was made pursuant to rule 2.15(a) of the CAR. The stating of that rule will be sufficient to illustrate the difficulty faced by the applicant in succeeding on this aspect of the application. It reads as follows:

‘2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition –

(a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR part 26...’ (Emphasis supplied)’

[44] On a proper construction of this rule, a pre-requisite for its use is the existence of a civil appeal. There was, at the time of the hearing of this application, no civil appeal in existence: the application being one, it should be remembered, seeking an extension of time to file such an appeal. In such circumstances, the applicant could not avail herself of this rule to successfully apply for a stay.”

[46] However, I am of the view, that a stay of execution may be granted subject to the condition that the applicant file her notice of appeal within a specified time. I am fortified in my position in light of the identical provisions of rules 1.7(3) of the CAR and 26.1(3) of the CPR. Both of these rules fall under the heading of ‘the court’s general powers of management’ and give this court wide discretion in managing the cases that are before it. Rule 1.7(3) of the CAR (as well as rule 26.1(3) of the CPR) states:

“1.7 (3) **When the court makes an order or gives a direction, it may -**

- (a) **make it subject to conditions;** and
- (b) specify the consequence of failure to comply with the order or condition.” (Emphasis added)

In such circumstances, the stay would only become operational, if and when an appeal is filed and ‘in existence’.

[47] I also find support in the decision of my learned brother Brooks JA in **Christopher Robinson v Rodney Garvey** [2018] JMCA App 20. In that matter, Mr Robinson’s applications for extension of time within which to file and serve notice of appeal from the judgment of a Parish Court Judge and a stay of execution of the said judgment were granted. The order for the stay of execution was made subject to the following conditions:

- “3. The stay of execution shall lapse if the applicant shall fail to file a notice of appeal in accordance with number 1 herein [that order having extended the time to file and serve the notice of appeal to a specific date], or otherwise fail to comply with any requirement of the Judicature (Parish Courts) Act or any of the rules and or orders of this court in respect of the prosecution of his appeal.”

A similar approach will be adopted in the instant case.

Conclusion

[48] Having considered all the relevant factors, I have concluded that this is an appropriate case for the court to extend the time for the filing and service of the notice of appeal, and to stay the execution of the judgment until the outcome of the appeal subject to the condition that the applicant file her notice of appeal within 14 days of the date hereof. There should also be no order as to costs.

MORRISON P

ORDER

1. The application for extension of time to file and serve notice of appeal is granted.
2. The period for filing and serving the notice of appeal and for the payment of the sum for the due prosecution of the appeal is extended to 14 days from the date hereof.
3. The execution of the judgment of Her Honour Ms Amina Maknoon, delivered on the 16 December 2019, is stayed pending the outcome of the appeal or any further order of this court conditional upon the applicant filing her notice of appeal within 14 days from the date hereof, failing which the stay of execution shall lapse.
4. No order as to costs.